No. 92-1168

In The

Supreme Court of the United States

October Term, 1992

TERESA HARRIS,

Petitioner,

v.

FORKLIFT SYSTEMS, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF OF PETITIONER

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ARGUMENT

I. THE FINDINGS RELIED UPON BY FORKLIFT CANNOT SUPPORT AFFIRMANCE ON INDEPENDENT GROUNDS BECAUSE THEY WERE MADE UNDER THE WRONG LEGAL STANDARD.

Notwithstanding its concession that psychological injury is not a necessary element of proof in a hostile environment case, Forklift, nevertheless, suggests that the decision below should be affirmed because independent grounds exist which support dismissal of Ms. Harris' claim. (Respondent's Brief, p. 18). Forklift's argument is legally incorrect.

When the wrong legal standard has been applied by a lower court this Court has reversed the decision below, and, usually, remanded for further consideration. *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *Wilson v. Seiter*, 111 S.Ct. 2321 (1991). It is likely when a lower court has erred with regard to the legal standard, that the lower court has also not fully considered all the evidence or has misconstrued the evidence. *Wilson v. Seiter*, 111 S.Ct. at 2328 (1991).

This is such a case. The findings upon which Forklift relies are inseparable from the magistrate's mistaken belief that a Title VII plaintiff must establish serious psychological injury as a necessary element of proof in a hostile environment case. The magistrate's search for psychological injury permeates each of the findings Forklift recites as an independent basis in support of affirmance. Specifically, the conclusion that Mr. Hardy's conduct would not have interfered with a reasonable woman manager's performance, is preceded by the magistrate's

observation that "I do not believe they [referring to Hardy's inappropriate sexual comments] were so severe as to be expected to seriously affect plaintiff's psychological well-being." (Pet. for Cert. App. A33 – A34). These statements are then, in turn, followed by the statement that "[n]either do I believe that plaintiff was subjectively so offended that she suffered injury . . . " from which the magistrate concludes ". . . I do not believe that he (Hardy) created a work environment so poisoned as to be intimidating or abusive to plaintiff." (Pet. for Cert. App. A34 – A35).

These findings flow directly from, and are inexorably tainted by, the magistrate's reliance upon the *Rabidue* rule which, the parties agree, is wrong as a matter of law. Each "finding" cited by Forklift is imbued with and infected by the magistrate's conviction that psychological injury is a prerequisite for hostile environment liability. Being skewed as they are by an erroneous legal standard, these findings cannot be relied upon in support of the judgment below. *Pullman-Standard v. Swint*, 456 U.S. at 292 (1982); accord, *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 502, n. 17 (1984) (A finding of fact is sometimes inseparable from the principles through which it was deduced).

Forklift attempts to avoid reversal by suggesting that the psychological injury test did not receive any particular weight or emphasis by the magistrate. This argument is belied by those very sections of the magistrate's Report and Recommendation upon which Forklift relies, which are replete with references to the magistrate's opinion that Ms. Harris' psychology harm or injury were insubstantial. (Pet. for Cert. App. A21 – A36). Furthermore,

there is no basis in the record for Forklift's assertion that the magistrate did not rely explicitly upon the psychological injury requirement of *Rabidue* when he denied Forklift's Motions to Dismiss. (Respondent's Brief, pp. 17-18). The Motions to Dismiss were both general and unspecific. There is nothing from which to discern either the bases for Forklift's Motions to Dismiss or the reasons for which they were denied, other than the magistrate's desire to have a complete record. (J.A. 136, 224).

II. THE PARTIES AGREE THAT *RABIDUE* IS WRONG.

Forklift concedes, and, thus, the parties agree[1] that psychological injury should not be a necessary element of proof in a sexual harassment claim alleging a hostile work environment. (Petitioner's Brief, pp. 12-16; Respondent's Brief, p. 14). Since *Rabidue* requires a finding of psychological harm, it is an erroneous application of the principles previously established by this Court. *See Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

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[1] All amici concur that psychological injury is not necessary for hostile environment liability with the exception of the Equal Employment Advisory Council, amici for Forklift, which did not specifically state any position on the psychological injury requirement in its brief. Equal Employment Opportunity Commission Brief, p. 22, n.13; NAACP Legal Defense Fund Brief, p. 13; NOW Legal Defense Fund Brief, p. 8; Women's Legal Defense Fund Brief, p. 5; American Civil Liberties Union Brief, p. 7; Feminists for Free Expression Brief, p. 29; National Employment Lawyer Association Brief, p. 4; Employment Law Center Brief, p. 6; American Psychological Association Brief, p. 6; Southern States Police Benevolent Brief, p. 3; National Conference of Women's Bar Association Brief, p. 9.

III. THE CORRECT APPLICATION OF *MERITOR* MUST FOCUS UPON HOW THE HARASSER'S CONDUCT ALTERED THE CONDITIONS OF THE VICTIM'S EMPLOYMENT.

A. In Order To Alter Conditions Of Employment, Unwelcome Conduct Based Upon Sex Must Be Either Severe Or Pervasive.

Under *Meritor*, unwelcome conduct, based on sex, must be either severe or pervasive if it is to rise to a level of being unlawful.[2] The admonition of this Court that the "mere utterance" of a gender based epithet which engenders offensive feelings in an employee would not alter the condition of employment leaves no room for disagreement. *Meritor Savings Bank v. Vinson*, 477 U.S. at 67 (1986) quoting *Rogers v. EEOC*, 454 F.2d 234 at 238 (5th Cir. 1971). Thus, isolated incidents or trivial slights are not sufficiently severe or pervasive, in and of themselves, to alter a work environment in violation of Title VII. This Court, and many of the courts of appeals, have exhibited no difficulty in making specific findings in hostile environment cases that unwelcome conduct has been either severe or pervasive. *Meritor Savings Bank v. Vinson*, 477 U.S. at 67 (1986); *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3rd Cir. 1990); *Hall v. Gus Construction Co.*, 842 F.2d 1010 (8th Cir. 1988).

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[2] Forklift incorrectly asserts that under Ms. Harris' view, offensive conduct need not alter the conditions of employment. This is a mischaracterization of Ms. Harris' position. (Respondent's Brief, p. 24; see, Petitioner's Brief, pp. 11, 29 and 40).

With respect to the severity or pervasiveness of unwelcome sexual conduct, the workplace must be considered objectively and the conduct in its totality. The parties agree to those factors suggested by the Equal Employment Opportunity Commission which courts should consider such as whether the conduct was physical, verbal or some combination of the two; the frequency and repetitiveness of the conduct; whether the conduct was hostile or potentially offensive; whether the harasser was a supervisor or co-worker; whether others joined in the conduct; and whether the conduct was directed at one or more persons. See *EEOC, Policy Guidance on Current Issues of Sexual Harassment (1989-91 Transfer Binder) CCH Employment Practices* ¶ 5258 at 6928 (March 19, 1990); (Petitioner's Brief, pp. 19-20; Respondent's Brief, p. 18). In evaluating the severity and pervasiveness of unwelcome conduct, courts must consider the conduct as a continuum and not in isolation. *Burns v. McGregor Electronics Ind.*, 955 F.2d 559 (8th Cir. 1993). Consideration of the conduct in its totality is necessary because less severe conduct may have greater impact in the workplace the more it is repeated. See *Risinger v. Ohio Bureau of Worker's Compensation*, 883 F.2d 475 (6th Cir. 1989).

Applying these principles, this Court can take note that the magistrate found that Ms. Harris was the object of a continuing pattern of sex-based derogatory conduct. (Pet. for Cert. App. A13 – A15). The magistrate also found that Hardy's conduct created a "joking" environment at Forklift. (Pet. for Cert. App. A18). These findings, viewed objectively and in their totality, support the conclusion that Hardy's conduct pervaded the workplace.

With respect to the severity of Hardy's conduct, it is clear from the record that it was a fixture in the Forklift workplace. The "joking" environment engendered by Hardy was tolerated by some female clerical employees who, the magistrate found, were used to accepting his denigrating behavior. (Pet. for Cert. App. A18, A31 – A32). The conduct ranged from the "inane and adolescent" to the "truly gross and offensive" (Pet. for Cert. App. A32 – A33). The source of the conduct was Ms. Harris' superior and the President of Forklift. The magistrate found the conduct to be both personally offensive and unwelcome to Ms. Harris and sufficiently eggregious to be offensive to a reasonable person in Ms. Harris' position. (Pet. for Cert. App. A33 – A34). Because the conduct was repetitive, wide-ranging in its content and offensiveness and emanated from the chief executive of the company, under the principles announced in *Meritor*, the conduct was also severe.

B. If Unwelcome Conduct Is Severe And/Or Pervasive, The Next Inquiry Is Whether It Was Sufficient To Alter The Conditions Of The Victim's Employment.

Title VII invests in the employees the right to work in an environment free from discriminatory conduct which imposes upon workers different terms and conditions because of their sex, age, race, religion or national origin. 78 Stat. 253, 42 U.S.C § 2000e-2(a)(1).

Forklift contends that workplace conditions are sufficiently altered only if an employee can either prove psychological injury or such interference with actual work

performance to impair a victim's actual ability to do his or her job. (Respondent's Brief, p. 28). As construed by Forklift, however, the phrase "interference with job performance" becomes the proverbial back door for reimposing the *Rabidue* rule of psychological injury.

It is difficult to imagine how a plaintiff might demonstrate an inability to perform his or her job with anything short of a showing of psychological injury. Thus, Forklift's proposed interpretation of *Meritor* reimposes the element that Forklift itself purports to reject: a showing of a psychological injury as a prerequisite to finding a Title VII violation. It is in this respect that Forklift's concession that psychological injury is not a necessary element of proof in a Title VII action is illusory.

Ms. Harris suggests, consistent with the arguments of amici Equal Employment Opportunity Commission and the American Psychological Association, that alteration of the conditions of employment be viewed expansively to encompass the entire range of effects that severe or pervasive offensive work place conduct based on sex may have on a victim's work environment. Consideration of the full range of such effects is fully consistent with the principles announced in *Meritor*. Thus, the Equal Employment Opportunity Commission considers interference with work performance to include, but not necessarily be limited to, hampered opportunities to succeed, the imposition of degrading behavior, or the denial of credit for work performed. (Equal Employment Opportunity Commission Brief, p. 25). It appears, in this respect, that the phrase "interference with work performance", may be too restrictive.

Research conducted on the effects of sexual harassment is presented and discussed in the amicus brief

submitted by the American Psychological Association.[3] The effects reported in the research includes deteriorated relationships with fellow employees, decreased feelings of competence, loss of self-esteem, loss of motivation, lack of recognition for accomplishments and lack of respect. (American Psychological Association Brief, pp. 7-8).

The research, as reported in the American Psychological Association Brief, supports the conclusion that offensive sex-based workplace conduct, if found to be either severe or pervasive, will alter the conditions of a victim's employment. Thus, to the extent that a plaintiff proves that he or she has been subject to such unwelcome conduct which is either severe or pervasive and can credibly establish similar sequelae of that conduct, the principles of *Meritor* have been satisfied.

Upon consideration of the full range of effects that severe and/or pervasive offensive workplace conduct may have, the record before the Court clearly establishes that the conduct Teresa Harris endured at Forklift was sufficient to alter the conditions of her employment. Teresa Harris testified that, as a result of Charles Hardy's conduct, she cried, was emotionally upset, hated going to work and, when at work, would sit in her office and shake. (J.A. 53). In her meeting with Charles Hardy on August 18, 1987, Charles Hardy himself acknowledged that Teresa Harris had been avoiding him. (J.A. 73). Charles Hardy's conduct brought Teresa Harris to the

[3] The Amicus Brief of the American Psychological Association was submitted on behalf of neither party.

point of tendering her resignation. (Pet. for Cert. App. A16). The sequelae of the harassment experienced by Ms. Harris are consistent with the research reported by amici American Psychological Association in its brief.

Charles Hardy questioned Ms. Harris' job performance publicly in the workplace with his statement about "[n]eeding a man as a rental manager"; he also ridiculed her competence with his workplace statements of "You're a woman, what do you know", and "You're a dumb ass woman". Similarly, the "truly gross and offensive statement" made in front of her co-workers suggesting that Ms. Harris had given sexual favors to secure a client not only denied Ms. Harris credit for her job performance, but was especially demeaning to a person in a managerial position. None of the conduct complained of by Ms. Harris was directed towards male employees. The conduct would not have been tolerated had it been directed to the spouse of either Mr. Hardy or another male Forklift manager. (J.A. 98, 233).

The conduct Ms. Harris was subjected to was continuous and of long duration; it was offensive to Ms. Harris and would have offended a reasonable person in her position[4]; it pervaded the workplace and affected her to the point that she was willing to, and later did, leave a job she enjoyed to avoid the conduct. Even applying the wrong legal standard, the magistrate observed that this was a "close case". (Pet. for Cert. App. A31). Under a correct application of *Meritor*, the conduct of Charles

[4] The parties agree that unwelcome workplace conduct should be considered from the viewpoint of a reasonable person in the position of the plaintiff (or victim). (Petitioner's Brief, pp. 34-40; Respondent's Brief, pp. 29-30).

Hardy should be found to be sufficiently severe or pervasive to alter Teresa Harris' working conditions in violation of Title VII. See *U.S. v. Fordice*, 112 S.Ct. 2737 (1992).

IV. THE *MERITOR* RULE AS APPLIED TO THE FACTS OF THIS CASE DOES NOT IMPLICATE ANY FIRST AMENDMENT CONCERNS.

This Court just recently held that the First Amendment does not protect "sexually derogatory fighting words" which may violate Title VII's general prohibition against sexual discrimination in employment. *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538, 2546 (1992). The First Amendment concern raised by Forklift is based upon the misconception that Ms. Harris was advocating a mere "offensiveness" standard for hostile environment liability. (Respondent's Brief, p. 31). On the contrary, Ms. Harris' Brief on the Merits is replete with references to the requirement that unwelcome sex-based workplace conduct must be sufficiently severe or pervasive to alter the conditions of the victim's employment. (Petitioner's Brief, pp. 11, 29, 40, 50). The standard advocated by Ms. Harris is fully consistent with this Court's view that "sexually derogatory fighting words" are not protected under the First Amendment.

In addition, as correctly argued by amici Feminists for Free Expression, there should be no First Amendment concern involved where such workplace conduct is directed at a particular employee. (Brief of amici Feminists for Free Expression, pp. 10-11). There is no question that in this record the conduct of which Ms. Harris complained was specifically directed at her as well as at other

female employees of Forklift. (Pet. for Cert. App., A13 – A15).

Thus, whatever First Amendment concerns are raised by Forklift or amici American Civil Liberties Union in their respective briefs, do not arise from the facts of this case, and, therefore, should not be addressed by this Court.

CONCLUSION AND PRAYER

For the reasons discussed above and in her opening brief, Ms. Harris respectfully requests that this Court reverse the judgments below dismissing her hostile environment and constructive discharge claims and enter judgment for her.

Respectfully submitted,

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